No. 13138

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

PAT DUBY, doing business as Pat Duby Company, and Continental Casualty Company, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Appellant does not agree that because of its motion to dismiss Pat Duby from this appeal that the argument commencing with the last paragraph on page 17 of appellant's brief and continuing through the middle of page 19, becomes immaterial.

To establish the liability of the surety, we of course must first establish the liability of the principal on the bond. That is all that argument is directed to.

The Continental Casualty Company frankly admits (p. 3 of its brief) that it was not released from liability as surety by virtue of Duby's discharge in bankruptcy.

It is argued that the claim of the government is in the nature of a penalty and therefore not recoverable, and secondly that Continental Casualty Company, as surety on the performance bond was released by the acts of the Government.

LIQUIDATED DAMAGES

On the first point, reliance is placed on four cited cases, chief among which is *Rispin v. Midnight Oil Company* (Ninth Circuit) 291 Fed. 481, 34 A.L.R. 1331 at p. 1334.

It will be our purpose to analyze these four cases and endeavor to point out wherein the instant case differs.

At page 14 of our opening brief we mentioned the Rispin case, expecting reliance thereon by appellee and pointed to the fact that that was one between pri-

vate parties, while here "public interest is involved" wherein a different rule obtains (citing cases).

A case from this court wherein the public interest was involved and establishing the rule contended for by us in *Six Companies v. Joint Hiway District No. 13*, 110 F. (2d) 621, in which this court followed the rule laid down by the United States Supreme Court in *United States v. Bethlehem Steel Company*, 205 U.S. 105, 51 L.Ed. 731.

On certiorari the Six Companies case, supra was reversed on the sole ground, as stated in the opinion. "The Circuit Court of Appeals should have followed the decision of the District Court of Appeals of California in *Sinnott v. Schumacher*, 45 Cal. App. 46. The question involved is: what is the law of California? * * * Had this case been tried in any superior (trial) court of California, such court would have been bound by *Sinnott v. Schumacher*, and the result would have been the opposite of that announced by the Circuit Court of Appeals. If therefore, the state law is to be determined just as it would be in a case tried in the state courts, we can not escape the conclusion that the decisions of the California District Courts of Appeals are binding on the federal courts."

Here, we have no such situation, because there is no such rule or statute in the State of Washington

where the contract in question was to be performed, as obtains in the State of California. In fact the rule and decisions in the State of Washington are in conformity with this 9th Circuit view (30 Wash. 178).

The other cases cited and relied upon by appellee, as well as the quotation from 34 A.L.R. p. 1336 have no bearing whatever on the rule applicable to public contracts.

The author of the annotations at page 1336 A.L.R., has this to say about liquidated damages.

> "Liquidated damages are amounts settled and agreed upon in advance, to avoid litigation as to damages actually sustained, they may exceed or fall short of the actual damages sustained, but *the sum thus determined in advance binds both parties to such agreement.*" (Italics ours)

citing as authority:

> *Pacific Hardware & Steel Co. v. United States* (1913) 48 Ct. Cl. (Fed.) 399.

We rely of course, on those cases dealing with public construction contracts, such as *United States v. Bethlehem Steel Co.*, cited in our opening brief, where, at page 1343 of 34 A.L.R. the author in referring to that case said:

> "The court stated that the fact that practically no damage accrued to the government on account of the failure to deliver the gun carriages could

> not affect the meaning of the clause for liquidated damages, or render its language substantially worthless for any purpose of security for the proper performance of the contract as to the time of delivery."

This has been the rule in the State of Washington as annunciated by the State Supreme Court as early as 1902, as indicated by the decision in the case of *American Copper, Brass & Iron Works v. Galland-Burke Brewing & Malting Company*, 30 Wash. 178, where it was held under a contract for liquidated damages, it is not necessary to show in what manner or to what extent the party claiming thereunder has been actually damaged, but upon establishing a breach of the condition entitling him to such damages he should be awarded the stipulated sum.

RELEASE OF SURETY

On the second point argued by appellee to the effect that the Casualty Company was released from its obligation under its performance bond.

Counsel argues that because the government on completion of the work accepted it as completed without reserving its right against the surety under the performance bond precludes the right of the government to recover the liquidated damages agreed to be paid in case of delay.

The argument is ingenious, to say the least, and no authority is cited to sustain the point, except a general rule cited from 43 Am. Jur. 917, §178 (Public Works).

The exception to this general rule is contained in Federal law (T. 40 § 269 U.S.C.), where the Congress has specifically provided that in all contracts for construction that "a stipulation shall be inserted for liquidated damages for delay" further providing that " * * * in all suits commenced on any such contracts or *on any bond* given in connection therewith *it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties.*" (Italics ours)

This rule was applied in the Consolidated Engineering case cited in our opening brief (35 F. Supp. 980) from which an appeal to this court was taken but subsequently dismissed on appellee's motion (123 F. (2d) 1015).

Appellee, on this point cites as additional sustaining authority the case of *Monro v. National Surety Co.*, 47 Wash. 488.

That case involved the surety on a building contract between private individuals, and from the opinion we note, at page 491 that no notice to the surety was given of the default — the bond there involved evidently providing for such notice.

Here, however, there was an express waiver of notice to the surety, the performance bond reading:

> "Now therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, *with or without notice to the surety*, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived, then this obligation to be void, otherwise to remain in full force and virtue." (Ex. 3 R.).

There is no provision in the bond in this case for notice to the surety, such as contained in the bonds involved in the Washington cases, especially in the case of *Heffernan v. United States Fidelity, etc.*, 37 Wash. 477, cited and referred to in the *Monro case*, supra, relied upon by appellee, so the question of notice to the surety in this case was not required.

The Washington cases cited by appellee on the question of surrender of collateral are inapposite in a case of this nature.

It is argued by appellee at page 13 of its brief that the principal of estoppel set out in its brief are applicable against the government acting in its propriety capacity. The fallacy of this argument is at once apparent when the nature of the work involved — drainage — is considered. This work was contracted for in the public interest and was therefore being done in a governmental and not a proprietory capacity.

Finally, appellee cites as sustaining authority for his argument on the subject of estoppel the case of *Branson v. Wirth*, 17 Wall. U.S. 32 (21 L.Ed. 566).

That was an equitable action in ejectment for the recovery of real estate. The holding of the Supreme Court was simply that an equitable estoppel is not available in an action of ejectment where the title is in issue.

In the light of the plain provisions of the Statute (T. 40 § 269 United States Code) there is not and can be no estoppel against a claim of the government for liquidated damages, under a written contract pro-

viding therefor. The provisions of the statute relied upon by us is quoted at page 10.. hereof.

CONCLUSION

Counsel having argued no other points it is respectfully submitted that the judgment of the District Court should be reversed and remanded with direction to enter judgment against appellee Continental Casualty Company as surety on the performance bond.

Respectfully submitted,

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